

- (1) Whether the Administrative Law Judge exceeded her jurisdiction in ordering further

medical treatment where any injury the employee may have sustained to the cervical spine has fully resolved.

(2) Whether the employee waived any right to further temporary total disability compensation by her unexcused failure to attend a scheduled medical examination ordered by the Administrative Law Judge.

In addition to the issues raised by the respondent in its Request for Review, the Appeals Board must also consider as an issue whether there exists a record sufficient to permit it to review this matter.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes on before the Appeals Board for review of a February 3, 1994 Order by Administrative Law Judge Shannon S. Krysl providing for payment of temporary total disability compensation and authorizing medical treatment. Counsel for the parties acknowledge that there is no transcript of proceedings as the Preliminary Order of February 3, 1994 was entered by the Administrative Law Judge following an off the record discussion between court and counsel which was conducted in chambers. No record was requested by any party at the time and no exhibits were entered into evidence. In addition, there is no stipulation by counsel concerning the substance of the evidence or testimony offered to the Administrative Law Judge upon which her decision was based.

K.S.A. 44-551 confers upon the Appeals Board the authority to review "all acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge... . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings."

The standard of review for the Appeals Board in a workers compensation case is the same as that conferred under prior law upon the district court. This standard was restated in Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 188, 836 P.2d 19 (1992), as follows:

"The standard of review in workers compensation cases is well settled. Kansas case law allows the district court a trial de novo on the record and, although the court is bound by the agency record, the district court has the jurisdiction and the duty to make an independent adjudication of the facts and the law. Reeves v. Equipment Service Industries, Inc., 245 Kan. 165, 171, 176, 777 P.2d 765 (1989). The district court has full power to grant or refuse compensation and to increase or diminish any award as justice requires. See Gawaith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169, 171, 476 P.2d 966 (1970)."

Here the parties admit that there is no agency record for the Appeals Board to review. K.S.A. 44-501(a) provides that the burden of proof is upon the claimant to establish his or her right to an award of compensation. However, it is the duty of the aggrieved party to request a record for appellate review purposes. The claimant apparently carried her burden before the trier of fact below. In the absence of a record, the Appeals Board has no way of ascertaining what support there is for the Administrative Law Judge's factual findings and legal conclusions, nor is there any feasible method for conducting an independent review of the evidence. We simply have not been furnished with any evidence from which the issues presented can be reasonably resolved.

The Appeals Board has the statutory authority to remand this matter to the Administrative Law Judge with directions to put into evidence that testimony which counsel represented would be forthcoming were a hearing held and upon which the Administrative Law Judge based her decision. However, to do so would be to accommodate the aggrieved party at the expense of the prevailing party below. There is no indication in this case that either party was denied the ability to make a record. Rather, it is represented that once the Administrative Law Judge communicated her predisposition in the matter, were the testimony to be as represented, counsel simply declined to proceed with an evidentiary hearing and no record was made. Claimant cites In re Marriage of Soden, 251 Kan. 225, 834 P.2d 358 (1992) for the proposition that the failure to request a record at the hearing constitutes a waiver of the right to object to the lack of a record.

As we have stated, the responsibility for making a record rests with the aggrieved party. In the absence of such a request having been made by the respondent, the Appeals Board considers it inappropriate to remand the matter for such proceedings to be conducted at this juncture. The respondent's application for review should instead be dismissed for failure to furnish an adequate record, thereby making review by the Appeals Board impossible.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the respondent's Request for Review should be and is hereby dismissed and that the Preliminary Hearing Order of Administrative Law Judge Shannon S. Krysl dated February 3, 1994 remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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